

A **Loh Eng Leong & Ors v**
Lo Mu Sen & Sons Sdn Bhd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-02-661
OF 1998

B MOKHTAR SIDIN, ABDUL KADIR SULAIMAN AND MOHD NOOR
AHMAD JJCA
26 JANUARY 2002

Companies and Corporations — Articles of association — Right of pre-emption — Interpretation — Interpretation of art 21(b) of articles of association — Whether transfer notice must be given for transfer of shares from member to member of company

C The second respondent, a shareholder of the first respondent company purchased 161 shares from another member, Lo Yoon Khong, on a willing buyer, willing seller basis on 6 November 1996 without the transferor having first given a written transfer notice to the company pursuant to art 21(b) of the company's articles of association ('AA'). The appellants contended that for such a transfer to be effective, there must be compliance with art 21(b) of the AA, but the respondents contended that since it was a transfer involving a member to another member of the company, the said sub-clause would not apply. The learned High Court judge was of the view that there was ambiguity in the wordings of art 21(b) of the AA and that there was no requirement of a transfer notice in this instance. The learned judge dismissed the application of the appellants for rectification of the first appellant's register of members by striking out the name of the second appellant as the holder of 161 shares. The learned counsel for the respondents argued that there were two limbs in art 21(a) with respect to the right to transfer shares which were separated by a saving clause. The first limb dealt with internal transfer and the second with external transfer and only in the second limb did the right of pre-emption arise. This case involved an internal transfer and thus, the provision of sub-cl (b) did not apply. Further, the expression 'fair value' in sub-cl (b) was found in the second limb and the words 'or person as selected aforesaid' could not refer to the first limb. The learned counsel for the respondent also questioned the 15 month delay in the making of the application for rectification by the appellant and suggested that all the appellants must be taken to have known of the transfer since 6 November 1996 and acquiesced to it because the third appellant was part of the members of the board which approved the transfer.

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Held, allowing the appeal for rectification with costs:

I (1) The whole of art 21 concerned the restriction imposed upon any transfer of shares in a private limited company such as that of the first respondent company. The whole idea behind such a restriction was to enable the members of such private limited company to have a priority to buy shares in the company in the

- event that another member intended to sell his shares in it be it to another member or otherwise (see p 260B–C). **A**
- (2) The maker of the AA of the first respondent company intended that the shareholders therein be protected in that any change in the structure of the shareholding by the disposal of the shares of any member, be it to another member or otherwise as permitted by law, must be with the knowledge of the other existing members, through a transfer notice. Looking at art 21(a), a share may be transferred by a member or other person entitled to transfer to any member selected by the transferor. However, it did not say that such transfer shall be without any restriction. In the light of the provisions of sub-cl (b) directing the attention of ‘the person proposing to transfer any shares’, a transfer notice must first be given to the company even if a transfer was from a member to another member, so as to invite the knowledge of the other members so that harmonious relationship among all members of the company could be maintained (see p 260E–I). **B**
- (3) The court found no ambiguity in sub-cl (b) as expressed by the learned judge. The expression ‘the person proposing to transfer’ appearing in sub-cl (b) means simply an intended transferor which included a member or other person entitled to transfer (see p 261H–I). **C**
- (4) From the evidence, the appellants had all along been objecting to the transfer. Their delay in seeking the assistance of the court was of the promise made that sooner or later the shares would be retransferred to all members of the company in proportion to their respective shareholdings, which promise was never honoured. In the circumstance, the delay in the making of the application was not such a serious issue that would disentitle the appellants to the exercise of the discretion by the learned judge to grant them (see p 264B–D). **D**
- (5) On the issue of acquiescence on the part of the appellants, learned counsel for the respondent’s submission lacked any merit particularly in respect of the first and the second appellants who were not parties to the approval of the transfer by the board of directors. Though the third appellant was present during the meeting of the board on 6 November 1996 and was assumed to have knowledge of the transfer of shares, his sin, if at all, should not have clouded the issue of discretion in granting the prayer of the appellants as a whole (see pp 264D–F, 265A). **E**
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[Bahasa Malaysia summary]

Responden kedua, seorang pemegang saham syarikat responden pertama telah membeli 161 saham daripada ahli lain, Lo Yoon Khong, berdasarkan pembeli yang berkeinginan, penjual berkeinginan pada 6 November 1996 tanpa pemindah terlebih dahulu **I**

- A** memberikan satu notis pemindahan secara bertulis kepada syarikat tersebut menurut perkara 21(b) perkara-perkara persatuan syarikat tersebut ('PP'). Perayu-perayu menghujahkan bahawa untuk pemindahan sedemikian berkuatkuasa, perlu ada pematuhan perkara 21(b) PP, tetapi responden-responden menghujahkan memandangkan ia adalah satu pemindahan yang melibatkan satu ahli ke satu ahli yang lain syarikat tersebut, maka sub-klausa tersebut tidak terpakai. Hakim Mahkamah Tinggi yang arif berpendapat bahawa terdapat ketaksaan dalam perkataan-perkataan perkara 21(b) PP dan bahawa tiada keperluan untuk adanya satu notis pemindahan dalam kes sekarang ini. Hakim yang arif telah menolak permohonan perayu-perayu untuk pembetulan daftar ahli-ahli perayu pertama dengan membatalkan nama perayu kedua sebagai pemegang 161 saham tersebut. Peguam yang arif bagi pihak perayu kedua menghujahkan bahawa terdapat dua cabang dalam perkara 21(a) yang diasingkan oleh klausa pengecualian berhubung hak untuk memindahkan saham-saham tersebut. Cabang pertama adalah tentang pemindahan dalaman dan yang keduanya tentang pemindahan luaran dan hanya dalam cabang kedua timbulnya hak untuk keutamaan membeli. Kes ini melibatkan satu pemindahan dalaman dan oleh itu, peruntukan sub-kl (b) tidak terpakai. Tambahan pula, istilah 'fair value' dalam sub-kl (b) didapati dalam cabang kedua dan perkataan-perkataan 'or person as selected aforesaid' tidak merujuk kepada cabang pertama. Peguam yang arif bagi pihak responden juga menyorkan tentang kelewatan 15 bulan dalam membuat permohonan untuk pembetulan tersebut oleh perayu dan mencadangkan bahawa semua perayu mesti dianggap mengetahui tentang pemindahan tersebut sejak 6 November 1996 dan bersetuju terhadapnya kerana perayu ketiga adalah sebahagian daripada ahli lembaga yang telah meluluskan pemindahan tersebut.
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Diputuskan, membenarkan rayuan tersebut untuk pembetulan dengan kos:

- G** (1) Keseluruhan perkara 21 adalah tentang sekatan yang dikenakan ke atas apa-apa pemindahan saham dalam sebuah syarikat swasta seperti syarikat responden pertama. Keseluruhan idea di sebalik sekatan begini adalah untuk membolehkan ahli-ahli syarikat swasta seperti ini mempunyai keutamaan untuk membeli saham dalam syarikat jika satu ahli lain berhasrat untuk menjual saham beliau kepada ahli lain atau sebaliknya (lihat ms 260B–C).
- H** (2) Pembuat PP syarikat responden pertama berhasrat pemegang-pemegang saham dilindungi di mana apa-apa perubahan dalam struktur pemegangan saham dengan penjualan saham mana-mana ahli, sama ada ahli lain atau sebaliknya sebagaimana yang dibenarkan oleh undang-undang, mestilah dengan pengetahuan ahli-ahli lain yang ada, melalui satu notis pemindahan. Melihat perkara 21(a), saham boleh dipindahkan oleh ahli atau orang lain
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yang diberikan hak untuk membuat pemindahan kepada mana-mana ahli yang dipilih oleh pemindah. Namun begitu, tidak dinyatakan pemindahan begitu hendaklah tanpa apa-apa sekatan. Berdasarkan peruntukan sub-kl (b) mengarahkan perhatian ‘person proposing to transfer any shares’, satu notis pemindahan mestilah terlebih dahulu diberikan kepada syarikat tersebut walaupun pemindahan adalah daripada satu ahli kepada ahli yang lain, di mana akan adanya pengetahuan oleh ahli-ahli lain agar hubung harmoni antara semua ahli syarikat boleh diamalkan (lihat ms 260E–I).

(3) Mahkamah mendapati tiada ketaksaan dalam sub-kl (b) sebagaimana yang dinyatakan oleh hakim yang arif. Istilah ‘the person proposing to transfer’ yang timbul dalam sub-kl (b) bermakna seorang pemindah yang berhasrat termasuklah ahli atau orang lain yang berhak untuk membuat pemindahan (lihat ms 261H–I).

(4) Berdasarkan keterangan, perayu-perayu dari mula membantah pemindahan tersebut. Kelewatan mereka meminta bantuan mahkamah adalah berdasarkan janji yang dibuat bahawa lambat laun saham-saham tersebut akan dipindahkan semula kepada semua ahli syarikat mengikut bahagian mereka masing-masing sebagai pemegang saham, di mana janji tersebut tidak ditunaikan. Dalam keadaan ini, kelewatan membuat permohonan tersebut bukan satu persoalan yang serius yang melucutkan hak perayu-perayu kepada penggunaan budi bicara hakim yang arif untuk membenarkan permohonan mereka (lihat ms 264B–D).

(5) Berhubung persoalan tentang persetujuan di pihak perayu-perayu, hujahan peguam yang arif bagi pihak responden kurang merit terutamanya berhubung perayu-perayu pertama dan kedua yang bukan pihak untuk mendapat kelulusan pemindahan oleh lembaga pengarah. Walaupun perayu ketiga hadir semasa mesyuarat lembaga diadakan pada 6 November 1996 dan dianggap mengetahui tentang pemindahan saham tersebut, kesalahan beliau, jika ada, tidak sepatutnya dikaburi dengan persoalan tentang budi bicara dalam membenarkan permohonan perayu-perayu secara keseluruhannya (lihat ms 264D–F, 265A).]

Notes

For cases on articles of association, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 30–41.

Cases referred to

Sing Eng (Pte) Ltd v PIC Property Ltd [1990] 3 MLJ 129 (refd)

Appeal from: Originating Summons No 24–51 of 1998 (High Court, Taiping)

A *Cecil Abraham (Yee Mei Kean with him) (Kim & Associates)* for the appellant.

Loh Siew Cheang (Kaka Rasul Velo and NK Yong with him) (Shearn Delamore & Co) for the respondent.

Abdul Kadir Sulaiman JCA (delivering judgment of the court): This appeal centres around the interpretation of art 21 of the first respondent's memorandum and articles of association. The said article states as follows:

- B** 21 The right of members to transfer their shares shall be restricted as follows:
- C** (a) A share may be transferred by a member or other person entitled to transfer to any member selected by the transferor; but save as aforesaid, and save as provided by sub-cl (f) and (g) hereof, no share shall be transferred to a person who is not a member so long as any member or any person selected by the directors as one whom it is desirable in the interests of the company to admit to membership, is willing to purchase the same at a fair value.
- D** (b) Except where the transfer is made pursuant to sub-cll (f) and (g) hereof, the person proposing to transfer any share ('the proposing transferor') shall give notice in writing to the company ('transfer notice') that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value, and shall constitute the company his agent for the sale to any member of the company (or person selected as aforesaid) willing to purchase the same ('the purchasing member') at the price so fixed, or, at the option of the purchasing member, at the fair value to be fixed in accordance with sub-cl (d) hereof. A transfer notice may include several shares, and in such case shall operate as if it were a separate notice in respect of each. A transfer notice shall not be revocable except with the consent of the directors.
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- F** (c) If the company shall, within the space of 28 days after being served with a transfer notice, find a purchasing member and shall give notice to the proposing transferor, he shall be bound, upon payment of the fair value as fixed in accordance with sub-cll (b) or (d) hereof, to transfer the share to the purchasing member.
- G** (d) In case any difference arises between the proposing transferor and the purchasing member as to the fair value of a share, the auditor shall, on the application of either party, certify in writing the sum which in his opinion is the fair value, and such sum shall be deemed to be fair value, and in so certifying the auditor shall be considered to be an expert, and accordingly the Arbitration Ordinance shall not apply.
- H** (e) If in any case the proposing transferor, after having become bound as aforesaid, makes default in transferring the share, the company may receive the purchase money, and the proposing transferor shall be deemed to have appointed any one director or the secretary of the company as his agent to execute a transfer of the share to the purchasing member, and upon the execution of the transfer the company shall hold the purchase money upon trust for the proposing transferor. The receipt of the company for the purchase money shall be a good discharge to the purchasing member, and after his name has been entered in the register in purported exercise of the aforesaid
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power, the validity of the proceedings shall not be questioned by any person.

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- (f) If the company shall not, within the space of 28 days after being served with a transfer notice, find a purchasing member and give notice in manner aforesaid, the proposing transferor shall at any time within three months afterwards be at liberty, subject to sub-cl (h) hereof, to sell and transfer the share to any person and at any price.

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- (g) Any share of a deceased member may be transferred by his executors or administrators to any child or other issue or relative of such deceased member to whom such deceased may have specifically bequeathed the same, and shares standing in the name of the trustees of the will of any deceased member may be transferred upon any change of trustees to the trustees for the time being of such will, and sub-cl (a) hereof shall not apply to any transfer authorized by this sub-clause.

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- (h) The directors may in their absolute and uncontrolled discretion refuse to register any proposed transfer of shares.

The learned High Court Judge was of the view that there appears to be ambiguity in the wordings of the provisions of art 21(b) thereof. He says so in his written judgment as follows:

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However as regards the provision of art 21(b) of the M&A of the said company there appears to be ambiguity in the wordings of the provision of the said article. Whereas art 21(a) of the M&A spells out the entity capable of transferring the shares as being 'a member' or 'other person entitled to transfer', art 21(b) of the M&A does not mention that said entity. Instead the said art 21(b) of the M&A spells out the entity that is required to give a transfer notice when transferring shares to a member as being 'the person proposing to transfer'. There is no mention of a member or other person entitled to transfer shares to a member being required to give a transfer notice. I am of the view since the restrictions imposed by art 21 of the M&A on the right to transfer shares appears ambiguous the court should interpret such restriction strictly and that when such a restriction is capable of two meanings, the less restrictive meaning should be adopted. Therefore the correct interpretation of s 21 of the M&A would be that there is no requirement of a transfer notice when a member or other person entitled to transfer wishes to transfer his shares to another member.

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Consequent upon his said view, the learned judge dismissed the application of the appellants by originating summons seeking, inter alia, (a) the rectification of the first appellant's register of members by striking out the name of the second appellant as the holder of 161 shares in the company numbered under the share certificates 0050 to 0053, and (b) that the company offers to all its members the purchase of the said 161 shares in accordance with the said art 21 of the company's articles of association ('AA').

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On the facts, the second respondent, a shareholder of the first respondent company purchased the said shares from another member of the company, Lo Yoon Khong, on a willing buyer and willing seller basis on 6 November 1996 without the transferor having first given a written transfer notice to the company that he desired to transfer the same to the second

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- A** respondent. The appellants contended, both before the learned judge and before us, that in order for such transfer to be effective, the requirement of art 21(b) must be complied with in that a prior written notice the REJA to have been given to the company. However, it is the contention of the respondents that since the transfer involved was between a member to another member of the company, the said sub-clause would not apply, and as such the said transfer of the 161 shares was a valid one.

- B** In the course of the hearing of this appeal before us, the appellants abandoned prayer (b) of their originating summons, which is that the company offers to all its members the purchase of the said 161 shares in accordance with the said art 21 of the AA. The learned judge in dismissing the application of the appellants did not allow this prayer of the appellants. Therefore, nothing more need be said about this prayer.

- C** Having heard the submissions and considering the evidence before us, we, on 26 July 2001 allowed the appeal with costs in relation to prayer (a) by ordering the rectification of the register of members of the first appellant's company by striking out the name of the second respondent as the holder of the 161 shares in the said company numbered under share certificates 0050 to 0053, both inclusive, thereby restoring the name of the transferor in the said register. We now give our reasons.

- D** The learned counsel for the respondents argues that there are two limbs in art 21(a) with respect to the right to transfer shares which are separated by a saving clause. The first limb deals with the internal transfer which is from a member or other person entitled to transfer, to any member selected by the transferor. The second limb deals with an external transfer which is from a member to a person who is not a member of the company. Only in such a latter proposed transfer does a right of pre-emption arise. It is contended that the purpose of the saving clause appearing between the two limbs to sub-cl (a) is to exclude or to except the specific of the foregoing subject matter from the operation of the general subject matter which follows thereafter. In other words, the function of the saving clause is to exclude a specific subject matter from the operation of a general clause. Since the transfer involved in the matter of the appeal was an internal transfer of shares and not an external transfer, the provisions of sub-cl (b) do not come into play. Further, the expression 'fair value' appearing in sub-cl (b) does not appear in the first limb but is found in the second limb of sub-cl (a). Under sub-cl (b), there is a requirement that the company be constituted as an agent to sell the subject shares to any member of the company. It is submitted that these words must naturally refer to the member who is willing to purchase the same at a fair value in the second limb of sub-cl (a) when involving an external transfer. It cannot refer to the member selected by the transferor referred to in the first limb, which deals with an internal transfer. Lastly, it was submitted that the words '(or person selected as aforesaid)' appearing in sub-cl (b) must necessarily refer to the 'person selected by the directors as one whom it is desirable in the interests of the company to admit to membership, is willing to purchase the same at a fair value' mentioned in the second limb to sub-cl (a). These words cannot refer to an internal transfer of shares under the first limb because

the question of selection by directors does not arise under the first limb thereof. **A**

At first blush, this submission by the learned counsel for the respondents appears to have great force. However, going back to the provisions of art 21 of the AA, looking at it as a whole, we find that the submission so made lacks any merit. The whole of the said art 21 concerns the restriction imposed upon any transfer of shares in a private limited company such as that of the first respondent company. The whole idea behind such a restriction is to enable the members of such private limited company to have a priority to buy shares in the company in the event that another member intends to sell his shares in it, be it to another member or otherwise. This is further to ensure that the shares in the company as far as it is possible, be held by the members of the family. The history of the first respondent company has been clearly laid down in the judgment of the learned judge. The company was founded by the father, Lo Mun Sen, after whom the company was named, who at the material period was the chairman. The three appellants and the second respondent are brothers and the sons of the founder. Prior to the setting up of the said company, the father had been operating as a sole proprietor in pawnshops and crockery retailing business. With the setting up of the said company, the father gave shares for the consideration of love and affection to his siblings, which includes, apart from them, his fifth son, Lo Yoon On and his sixth son, the transferor of the whole of his 161 shares in the company given to him by the father, which is the subject matter of the present dispute. This transfer of the shares belonging to the sixth son of the father was approved by the board of directors by way of resolution. Thereafter, the transfer was lodged and registered with the Registrar of Companies. Therefore, it is safe to assume that the maker of the AA of the first respondent company intends that the shareholders therein be protected in that any change in the structure of the shareholding by the disposal of the shares of any member, be it to another member or otherwise as permitted by law, must be with the knowledge of the other existing members, through a transfer notice given to the company, thereby giving them the option to purchase at fair value before the shares go out of his hand. More so, if the transfer is on a supposed collusion between the two members, the intended transferor and the transferee, or worse, if it is to be sold to any person selected by the directors as one, whom it is desirable in the interests of the company to admit to membership. Bearing that in mind, looking at the first respondent company's art 21(a), it is true that a share may be transferred by a member or other person entitled to transfer to any member selected by the transferor. But it does not say that such a transfer shall be without any restriction. Though it says that it may be transferred to any member selected by the transferor, however, in the light of the provisions of sub-cl (b) directing the attention of 'the person proposing to transfer any shares', a transfer notice must first be given to the company even if a transfer is from a member to another member, so as to invite the knowledge of the other members so that a harmonious relationship among all members of the company is maintained. The purpose of the restriction is also to preserve the proportionality of the other **B**
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A members' shareholdings as between themselves. However, if after the proper notice is given and no taking is forthcoming from the other members, these other members cannot later grouse over the change in the structure of the shareholding in the company. More so, in the present case, it was the intention of the founder of the company to distribute the shares among his children in that fashion, ie his first two children (the first

B appellant and the second respondent respectively) were each to receive equal shares of 241 shares each, which are bigger in quantum than the rest of his four other younger children (the second and third appellants, his fifth child and the transferor), each of 161 shares only.

C The exception in sub-cl (b) made no mention at all as regard the transfer other than the transfer made pursuant to sub-cll (f) and (g), which do not concern us here. It may invite a separate consideration if the said exception also includes the transfer made pursuant to sub-cl (a) which governs, as well, a transfer by a member or other person entitled to transfer to any member selected by the transferor as is to be found in art 34 of the articles of associations of the company in *Sing Eng (Pte) Ltd v PIC Property*

D *Ltd* [1990] 3 MLJ 129, which art 33 thereof is in pari materia with art 21 (a) of the AA. Its art 34 excepted as well the transfer made pursuant to art 33. In the circumstances, it is our view that the intent of sub-cl (b) is to cover all transfers, be it from a member or other person entitled to transfer to any member selected by the transferor or from a member to a person who is not

E a member. The phrase 'but save as aforesaid, ... no share shall be transferred to a person who is not a member so long as any member or any person selected by the directors as one whom it is desirable in the interests of the company to admit to membership' appearing in sub-cl (a) thereof, in our view, stands on its own in the sub-clause and is not in any way narrowing down the effect of sub-cl (b). The latter sub-clause, therefore,

F embraces all transfers as stated earlier. In the circumstances, any transfer of shares taking place within the first respondent company must be governed by the provisions of sub-cl (b) in that the person proposing to transfer any share in the company must abide by the requirements of sub-cl (b) thereof. In other words, this latter sub-clause governs not only the transfer of shares among members, but also from a member to any person permitted by the

G memorandum and articles of association for such a private limited company's shares to be transferred. We say so, in the light of the opening words of sub-cl (b): 'Except where the transfer is made pursuant to sub-cll (f) and (g) hereof'. Other than such transfer, there would not be any exception given by sub-cl (b).

H As to the ambiguity in sub-cl (b) expressed by the learned judge, with respect, we find none. The learned judge was of the view that the expression 'the person proposing to transfer' appearing in sub-cl (b) does not connote 'a member or other person entitled to transfer' appearing in the first limb of sub-cl (a). Hence, the ambiguity. With respect, we disagree. This expression used in sub-cl (b) means simply an intended transferor which

I includes a member or other person entitled to transfer. Form 340 in cl 2 cited in *Palmer's Company Law* (11th Ed) Part 1 uses the expression 'the person proposing to transfer any share ('the proposing transferor')'.

The learned author says:

The words 'proposing transferor' cover the shareholders and also executors and other persons taking by transmission and having power to transfer.

Form 260 in cl 4 cited in *The Encyclopaedia of Forms and Precedents* (5th Ed) Vol 9 similarly uses the expression 'the proposing transferor'.

So, indeed there is no magic in the use of the expression 'the person proposing to transfer' or 'the proposing transferor' in sub-cl (b) thereof so as to cause the ambiguity in the mind of the learned judge resulting in him in having to interpret the sub-clause strictly in the manner he did.

In conclusion, we hold the view that in the nature of the wordings of sub-cl (b) excepting only the transfer made pursuant to sub-cl (f) and (g), which do not concern us here, a prior written transfer notice is required even though a transfer is made by a member to another member, as in the present case. Such requirement by sub-cl (b) of a transfer notice is not confined only to an external transfer, as so termed by the learned counsel for the respondents.

But that is not the end of the matter. The respondents also questioned the delay in the making of the application for rectification by the appellants. In this case, the delay amounts to about 15 months from the date of the transaction in respect of the 161 shares. The learned judge in his judgment said:

I further find that the plaintiffs have been guilty of delay and laches in making their application for rectification of the register under s 162 of the Act at this stage. The position of s 162 of the Act is discretionary in nature and therefore the court needs to look into the facts of the case whether it can exercise its discretion. This discretion can only be exercised if it is satisfied of the justice of the case. In the present case there has been a delay of about 15 months after the plaintiffs had accepted and acquiesced to the said transfer of shares from one member to another member before such an application is made. In the case of *Re Len Chee Omnibus Co Ltd* [1969] 2 MLJ 202 the court held that as the application was not made within a reasonable time after the applicant became aware of the facts entitling her to relief the application must therefore be dismissed for laches. In the case of *Re Asian Organization Ltd* [1961] MLJ 295 the court took the view that it still has the jurisdiction not to rectify the register and may decline to do so if, for instance the applicant has acquiesced in regarding the allottee as a member of the company notwithstanding the invalid allotment. In the case of *Bellerby v Rowland & Marwood's Steamship Company Ltd* [1901] 2 Ch D 265 it was held inter alia that the justice of the case did not require the rectification of the register after the lapse of more than seven years and when nothing had happened in the meantime. It is my view that since the plaintiffs have failed to stop the second defendant as a member from purchasing the said shares from another member at the resolution adopted by the board of directors of the said company approving the transfer and that there has been considerable delay in making their application for rectification of the register this court cannot give the plaintiffs now 'a second bite at the cherry.'

The appellants, through the affidavit in support of the application, gave the reason for the delay. There were discussions had with a view to settle the

A matter of the transfer amicably. Some time in December 1996, when they protested to the said share transfer, the second respondent decided to tender his resignation as the managing director of the company. However, the second respondent's resignation was then not accepted by the chairman. A further discussion between the parties then took place wherein the second respondent and the father, who was the chairman of the first respondent company told the appellants that in due course, steps would be taken to transfer the disputed shares to all the shareholders in proportion to their respective shareholdings. But the promise of the transfer of disputed shares to the shareholders never materialized. A copy of each of the resignation letter of the second respondent and the rejection by the chairman dated respectively 27 December 1996 and 31 December 1996 was exhibited in the said affidavit for the appellants. The respondents, by their affidavit, denied and gave their reason for the attempted resignation of the second respondent being due to their strained relationship on account of the non-cooperation of the appellants in the management of the company leaving everything to the second respondent who sacrificed so much for the company after resigning from his former job as an engineer for 20 years but not being appreciated by the appellants. The affidavit of the appellants further explains that when attempts at settling the matter amicably was without success, they instructed their solicitors which by a letter dated 4 February 1998 notified the respondents of their intended application to the court.

E In his judgment, the learned judge made no mention of the version of the evidence proffered by each party except to mention on the aspect of the evidence as related to the third appellant when dealing with the issue of acquiescence on the part of all of the appellants. We will say more on this later when dealing with the issue. For the moment, it is to be noted that the third appellant alone attended the board of directors meeting on 6 November 1996, wherein a resolution was passed approving the transfer of the said 161 shares from the transferor to the second respondent. The first and the second appellants were not at the meeting. This is what the learned judge said on the issue of acquiescence:

G It is also my finding in this case that since the third plaintiff had attended the board of directors meeting when it was unanimously resolved that the said transfer of shares be allotted to the second defendant and now that the third plaintiff gave conflicting evidence through his affidavit objecting to the said transfer, the court should give less weight to his evidence. It would be incongruous to allow parties who have acquiesced to the act to be allowed to renege by applying to this honourable court for rectification of the register.

H The learned judge is entitled to comment on the evidence of the third appellant, but it is rather unfortunate for him to have stated that by giving less weight to the evidence of the third appellant, it would be incongruous to allow all parties which comprised the first and the second appellants as well, who have acquiesced to the act to be allowed to renege by applying for rectification of the register. We say so because, the first and the second appellants were not parties to the resolution passed in respect of the transfer

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of the said shares. In any event, even in respect of the third appellant, we would say more later as regards his evidence on the matter. A

It is the view of the learned judge that since the appellants (all three of them) have failed to stop the second respondent as a member from purchasing the said shares from another member at the resolution adopted by the board of directors of the said company approving the transfer, and that there has been considerable delay in making their application for rectification of the register, the court cannot give the appellants now a second bite at the cherry. We feel that the learned judge has erred in so forming his view when considering the application, particularly that of the first and the second appellants. This is so because from the evidence, the appellants had all along been objecting to the said transfer. Their delay in seeking the assistance of the court, as explained by them, was of the promise made that sooner or later the said shares would be retransferred to all members of the company in proportion to their respective shareholdings, which promise was never honoured. In the circumstances, the delay in the making of the application was not such a serious issue that would disentitle the appellants to the exercise of the discretion by the learned judge to grant them. B C D

Lastly, on the issue of acquiescence on the part of the appellants as found by the learned judge, being one of the reasons for not exercising the discretion in favour of the three appellants, learned counsel for the respondents in his submission suggested that all the appellants must be taken to have known of the transfer since 6 November 1996 because the third appellant was part of the members of the board which approved the said transfer. For the reason we stated earlier, this submission lacks any merit particularly in respect of the first and the second appellants who were not parties to the approval of the transfer by the board of directors. As for the third appellant, though he was present during the meeting of the board on 6 November 1996, on the evidence as contained in his affidavit affirmed on 16 May 1998, he admitted signing the attendance at the meeting but he did it on the assumption that it was in the ordinary course of the company's business. He questioned the brief minutes of the meeting recorded which states that the chairman who is the father, proposed the resolution and it was seconded by the second respondent who was an interested party to the transaction. Perusing the copy of the minute at p 226 of the record, we agree that it is indeed a brief one. The chairman proposed that the resolution be approved and the second respondent, the purchaser, seconded the resolution so proposed and was declared carried. Unfortunate indeed that no record was made in the minute as to any view expressed by the third appellant. According to the list of attendance at the meeting, a copy of which is at p 227 of the record, only four, including the third appellant and the secretary, were present. E F G H

Excluding the proposer and the seconder, the only other member present was the third appellant. Naturally, even if the third appellant had objected to the said transfer, the resolution would have been carried, he being in the minority. In any event, we are not with the third appellant that he was at the meeting on the assumption that it was in the ordinary course I

A of the business of the company because from the notice served on him, it was clearly stated that one of the agenda was to approve the transfer of shares. His sin, if at all, should not have clouded the issue of discretion in granting the prayer of the appellants as a whole.

B For the above reasons, having considered all aspects of the matter, it is the justice of the case that the discretion the REJA to have been exercised in favour of the appellants in granting the first prayer sought that the register of members of the first respondent company be rectified by striking out the name of the second respondent therefrom as the holder of the 161 shares numbered under the share certificates 0050 to 0053 and restored therein the name of the seller as owner of the said shares.

C *Appeal allowed with costs in relation to prayer (a).*

Reported by Chew Phye Aun

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